THE MARYLAND AND VIRGINIA BOUNDARY CONTROVERSY

(1668-1894)

BY

LOUIS N. WHEALTON, A. B., LL. B.

A DISSERTATION

PRESENTED TO THE BOARD OF UNIVERSITY STUDIES OF THE JOHNS HOPKINS UNIVERSITY IN CONFORMITY WITH THE REQUIREMENTS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY, JUNE, 1897.

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THE MARYLAND AND VIRGINIA BOUNDARY CONTROVERSY

Introduction

The long controversy between Maryland and Virginia, over their common boundary, began about the year 1660, and continued until 1894, having the following points at issue:

I. The western end of the line which was to divide Maryland and Virginia, was described in the charter to Lord Baltimore in 1632, as "The first fountain of the Patowmack." The Potomac River has two branches, called the north and the south branch respectively. Maryland claimed that the south branch was the "first fountain," and that the land between the two branches was hers. Virginia disputed this claim and pronounced the north branch to be the first source. The land between the two branches was, at last, yielded to Virginia, and Maryland consented to begin the boundary line on the north branch. A final settlement of the question remains to be made between Maryland and West Virginia.

II. Maryland claimed also the entire Potomac River under her charter. Virginia likewise claimed the river on similar grounds. A board of arbitrators marked out the boundary in 1877, and gave the river to Maryland.

III. The place where the boundary between the two colonies met the shore on the eastern side of the Chesapeake Bay was called Watkins Point by the Maryland Charter of 1632. The location of this point was in dispute for a long time. Virginia claimed that it was farther north than it is at present. Maryland held it to be about where it is now located. When the arbitrators designated it upon the maps, they conceded Maryland's claim.

IV. Maryland and Virginia entered into an agreement known as "the compact of 1785," for the protection of shipping and punishment of crimes upon the waters which formed their common boundary. A century afterwards, Virginia excluded Maryland from taking oysters in Pocomoke Sound. Maryland claimed that, under the "compact," she had a right, in common with Virginia, to these oyster beds. These resources had become very valuable, and were estimated at that time to be worth twenty millions of dollars. The Supreme Court of the United States decided, in 1894, that the "compact of 1785," gave Maryland no right to take oysters in Pocomoke Sound, and the long controversy was thus brought to a close.

I

CHARTERS AND GRANTS, 1606-1632.

Virginia Charters

Queen Elizabeth, on the twenty-sixth day of March, 1584, made the first grant of land called Virginia, to Sir Walter Raleigh, giving to him, his heirs and assigns, "free liberty to search for and find such barbarous lands, not possessed by any Christian people, as to him might seem good, and the same to occupy and enjoy forever." No boundaries are mentioned in this grant.

James I, in 1606, issued letters patent authorizing the London Company to settle between the thirty-fourth and forty-first degrees north latitude, and vested in them property rights to the land extending along the coast fifty statute miles on both sides of the first chosen settlement, and reaching into the interior one hundred statute miles. All islands less than one hundred statute miles distant from the coast were to belong to the company. Under this grant, Jamestown was settled in 1607. Here we find Virginia's first boundaries, which, on the north and south after 1607 were each fifty statute miles distant from Jamestown. But the land granted had not yet been

explored, and, owing to the indentations of the coast, the territory could not well be confined to such limits. This fact was made very evident by the exploring expeditions of Capt. John Smith in 1608.[1]

The London Company applied to the King for a new charter and, in 1609, he granted to the company "all those lands . . . in that part of America called Virginia, from the point of land called Cape or Point Comfort, all along the sea coast to the northward two hundred miles; and from the said Point or Cape Comfort, all along the sea coast to the southward, two hundred miles; and all that space and circuit of land lying from the sea coast of the precinct aforesaid, up into the land throughout from sea to sea, west and northwest; and also all the islands lying within one hundred miles along the coast of both seas of the precinct aforesaid."[2] Since the Plymouth Company had made no settlement at the time of the above patent, the country was open to this new grant, which was, as declared by the King, to be "a further enlargement and explanation of the former grant" of 1606.

The boundaries of Virginia were still defined as being so many miles from a given point and were not indicated by natural objects or definite landmarks. The colony was now bounded by the Atlantic Ocean on the east, the Pacific on the west, and lay between the thirty-fourth and fortieth degrees north latitude.

King James I granted a third charter "to the treasurer and Company of Virginia for the ample extent of their territories into the seas, and also for the better government of the Company and colony."[3] This charter, which was given in 1611, extended the territorial rights of Virginia to all islands within three hundred leagues of the coast, and confirmed the grant of 1609.

[1] "History of Virginia," by John Smith, vol. 1 and map, p. 154 and herein p. 10.

[2] "Charters and Constitutions," B. P. Poore. Part 2, p. 1897.

[3] Ibid. Part 2, p. 1902-8.

Soon there arose a dispute between the King and the company. The King demanded a submission of the company's charters for the purpose of revision, and on its refusal to comply, the three charters of the London Company were cancelled by a judgment of the Court of King's Bench in 1624. Good legal authority sanctioned and advised the revocation, pleading that "it was in general an unlimited vast patent. In particular the main inconvenience was, that by the words of the charter the Company had a power given them to carry away and transport to Virginia as many of the King's living subjects as were desirous to go thither. And consequently by exercising this liberty they may in the end carry away all the King's subjects into a foreign land." Chief Justice Ley rendered the decision "that the patent or charter of the company of English merchants trading to Virginia, and pretending to exercise a power and authority over his Majesty's good subjects there, should be thenceforward null and void.[4]" In a short time the King appointed a number of commissioners to take charge of the affairs of the colony and Virginia became a royal province.

To what extent the charters were meant to be declared "null and void" has been a question of much dispute, and one on which various opinions are still maintained—Marylanders and Virginians holding opposite views. Maryland has held that the judgment of the Court of King's Bench pronounced in a case of *quo warranto* in the year 1624, abrogated all claims, territorial and governmental, of Virginia, so that the charter was entirely annihilated, thus making way for any new grant. Virginia has contended that the nullification of the charters took away only the monopoly of the company and its government over the colony, and did not at all affect the territorial limits or other rights of the colony itself. The only

[4] "The History of the Virginia Company of London." Edward D. Neill; p. 416–417.

change, according to Virginia's claim, was from the proprietary government of a trading company to a royal government over the same domain and colony.[5]

Charter of Maryland

A letter dated August 19, 1629, was sent by George Calvert, first Lord Baltimore, to King Charles I, stating

[5] This view is set forth fully in "Reports of Committees," No. 457. Twenty-eighth Congress of the U. S., Session 2, vol. ii, 1843–4, and is as follows:

I. "The colonial legislature of Virginia clearly held the charters to be taken away from the Company only, the rights of the colony remaining the same. In 1642 an effort was made to restore the colony to the Company, but Virginia made an earnest remonstrance and took part with the Court against the Company, even issuing a declaration which set forth the misgovernment and evils sure to result to the colony if the power and monopoly of government should be restored. (1 Hening Stat., p. 230–36.)

II. "That it was so understood by the colonial executive of Virginia is shown by the answer of Governor Berkley in 1671 to one of a series of statistical inquiries of the Commissioners of Foreign Plantations. (McDonald Papers, V, p. 19.)

III. "Chief Justice Marshall, delivering an opinion of the Supreme Court in the case of Johnson v. McIntosh, says: 'This charter (of Virginia, 1609) was annulled so far as respected the rights of the Company by the judgment of the Court of King's Bench on a writ of quo warranto, but the whole effect allowed to this judgment was to revest in the Crown the power of government and the title to the lands within its limits.' (8 Wheaton, 578.) The manifest conclusion is that the charter, far from being annihilated, was recognized and revested in the crown.

IV. "In the year 1651 articles were drawn up at James City in Virginia for surrendering the province to the government of the commonwealth of England. The fourth article of this treaty of capitulation states, 'That Virginia shall have and enjoy the antcient bounds and Lymitts granted by the charters of the former kings, and that we shall seek a new charter from parliament to that purpose, against any that have entrencht upon the rights thereof.' This was an assertion of rights by Virginia to that territory contained in the grant of 1609, and this assertion was nominally recognized by Parliament. (Jefferson's 'Notes on Virginia' . . . Answer to question XIII.)

V. "Virginia became a sovereign state in 1776, and put forth the constitution under which alone claim to title and territorial rights are held at present. Following this in 1784 Virginia ceded to the United States the northwestern territory, and Art. V, clause I of the Constitution recognizes and ratifies the contract of this cession, acknowledging Virginia's title to the land. (Deed of cession of N. W. Territory.)"

the causes of failure of the Newfoundland colony and beseeching that sovereign to make him a new grant.[6] The King replied: "We out of our princely care of you while weighing that men of your condition and breeding are fitter for other employments than the framing of new plantations, have thought fit hereby to advise you to desist from further prosecuting your designs that way and with your first convenience to return back to your native countrie."

Baltimore went in person with some of his followers to James City in October, 1629. Here he did not meet with a cordial reception, as might be expected from the fact that he was of the Catholic faith, and that toleration in religious matters at that time was unknown in the Virginia Colony. Governor Pott, William Claiborne and others sent a letter to the Privy Council, announcing that Lord Baltimore had arrived, and that they had thereupon tendered to him and his followers the oaths of supremacy and allegiance. The oaths were refused, but Lord Baltimore offered to take an oath which he substituted.[8] This was declined on the part of the colonial authorities who would not depart from the regular form and who rejoiced that "noe papist" had been allowed to settle amongst them. Some violence was attempted and insult shown to Lord Baltimore, and we find that one Tindall was pilloried for such offence.[9]

Lord Baltimore returned to England and died two months before the Maryland charter had passed the seal. The grant was made to his son Cecilius in 1632.[10]

[6] "Archives of Maryland," Proceedings of Council, 1636–67, p. 15.

[7] "McDonald Papers," vol. ii, p. 1, Nov. 22, 1629.

[8] "Archives of Maryland," Proceedings of the Council, 1636-1667, pp. 16-17.

[9] "Statutes at Large," W. W. Hening, vol. i, p. 552.

[10] The charter defines the grant to be "All that part of the Peninsula, or Chersonese lying in the parts of America between the ocean on the east and the Bay of Chesapeake on the west; divided from the residue thereof by a right line drawn from the promontory or headland called Watkins Point, situated upon the bay aforesaid near

REPRODUCTION OF PART OF JOHN SMITH'S MAP. 1609.

This map shows Watkins Point, the Wighco River and Cinquack—three boundary marks mentioned in the Maryland Charter (p. 10, note 10). The Wighco River was afterwards known as the Pocomoke (p. 18). It was subsequently shown that Smith's Point and not Cinquack was the true southern head-land of the Potomac. The commissioners who drew up the compact of 1785 began the dividing line at Smith's Point (pp. 23–24, and map marked by arbitrators p. 42).

Many objections were urged against Lord Baltimore's patent.[11] In 1633, a petition of protest from the planters in Virgina was sent to the King and was referred by him to the Lords Commissioners for Foreign Plantations. The Board ordered that the adventurers and planters of Virginia, as one party, and Lord Baltimore should meet and "Accommodate their controversy in a friendly manner if it might be, and likewise sett down in writing the propositions made by either party, with their several answers and reasons to be presented to the Board," on July 3, 1633. This was done and "Their Lordshipps having heard and maturely considered the sayde propositions, answers and reasons, and whatsoever else was alleaged in either parte, did think fit to leave the Lord Baltimore to his Patent and the other partie to the course of Lawe ac-

the river Wighco on the west unto the main ocean on the east; and between that boundary on the south, unto that part of the bay of Delaware on the north which lieth under the fortieth degree of north latitude from the æquinoctial, where New England is terminated; and all the tract of that land within the metes under-written (that is to say) passing from the said bay, called Delaware Bay, in a right line, by the degree aforesaid, unto the true meridian of the first fountain of the river Patowmack, thence verging towards the south, unto the further bank of the said river and following the same on the west, and south unto a certain place called Cinquack, situate near the mouth of the said river, where it disembogues into the aforesaid bay of Chesapeake, and thence by the shortest line unto the aforesaid promontory, called Watkins Point." "Laws of Maryland with the Charter" Thomas Bacon.

[11] In the petition for the grant, the region described in the charter was declared to be unsettled save by savages. This was denied, and it was held by those opposing the patent that a part of "Said Region had bin formerly inhabited by His Majesty's Subjects which were sent over from the London Colony of Virginia." Further it was charged that the recent grant infringed on Virginia's charter of 1609. Besides this many inconveniences and faults were pointed out in the powers given Lord Baltimore. He had the power to grant any part of his territory to whomsoever he pleased whether they were aliens, savages, or enemies of the Kingdom. War could be made or peace declared without reference to the convenience of the other English colonies. No restraint was made as to furnishing the savages with arms, and the almost royal power granted to Lord Baltimore enabled him to manage his colony independent of all others. See "Considerations upon the patent to Lord Baltimore 1632," in "Archives of Maryland," Proceedings of the Council, 1636–1667, pp. 17–19.

cording to their desire; but for the preventing of further questions their Lordshipps did also think fit and order that things standing as they doe, the Planters on either side shall have free traffique and commerce each with other and that neither partie shall receive any fugitive person belonging to the other, nor doe any act which may drawe a warre from the natives upon either of them." [12]

Governor Harvey of Virginia obeyed instructions from the King in being friendly to the new colonists on their arrival, and for this kindness we find the King directing him a letter of thanks at the request of Lord Baltimore.[13] The council, however, opposed Harvey in every measure concerning Maryland, and loudly said they would rather kill their cattle than sell them to their neighbor colony.

The assertion of Virginia's claim to Maryland during this early period was not noticed by the Protector in 1658, and the government of Lord Baltimore's colony passed into the hands of his representative, Fendall.[14]

II

The Work of the First Boundary Commissioners 1632-1668.

The grant to Lord Baltimore, in 1632, was regarded as an infringement upon the Virginia Charter of 1609, and during the first half of the seventeenth century, the Colony settled by the London Company strenuously asserted its claim to the Maryland territory. This was the

[12] "Archives of Maryland," Council Proceedings. 1636–1667; "Order of Lords Commissioners for Foreign Plantations," July 3, 1663, p. 21–22.

[13] Ibid. pp. 22–27.

[14] For an account of the Kent Island controversy between Virginia and Lord Baltimore, see "Early Relations between Maryland and Virginia," by J. H. Latané, Ph. D., in Johns Hopkins University Studies, Series 13, Nos. 3, 4; pp. 8–31.

beginning of a long dispute, the first period of which ended when Virginia ceased to petition the Crown for the abrogation of the Proprietor's patent. In 1638, the ownership of Kent Island was decided, and Virginia abandoned the claim to Maryland territory in general. During the two hundred years which followed, the contention survived, but in a new form. The next attack was not upon the Maryland charter of 1632 *in toto* but piecemeal. The interpretation of that charter became the cause of altercation.

The difference of opinion centers around two clauses of Lord Baltimore's charter. One of these clauses designated the "First fountain of the Patowmack" as being the western end of the southern boundary of Maryland. This will be treated later. The other clause laid down Watkins Point, situate near the river Wighco as a definite point near the eastern end of the line which was to divide the Chesapeake Bay and peninsula between the two colonies.

It little concerned the people of either of these colonies where the boundary was so long as the country through which the line passed was unsettled and no man's right was affected by the indefinite location of the dividing line. When the colonies began to settle their border territory, then began border bickerings.

This fact is illustrated by the rise of a contention as to the location of Watkins Point. The charter of 1632 made it certain that the line, which divided the Maryland and Virginia peninsula between them, was to start from Watkins Point on the Chesapeake side of this peninsula and follow a due east course to the ocean.

The southern part of the narrow neck of land known as the Eastern Shore was settled by Virginians about 1620, near an Indian village called "Accawmacke."[15] As

[15] John Smith visited the "Laughting King of Accawmacke," and located the village of Accomack. "History of Virginia," John Smith, vol. ii, p. 40, and map.

early as 1634 we find Accomack mentioned as one of the eight shires into which Virginia was divided.[16]

Lord Baltimore requested the Governor of Maryland to colonize that part of his province adjoining Virginia on the Eastern Shore. Accordingly, Philip Calvert, in 1661, appointed Edmund Scarburgh,[17] Randall Revell, and John Elzey, Commissioners, to grant lands on the Eastern Shore of Maryland, to those who desired to settle there on condition of taking an oath of fidelity to Lord Baltimore.[18]

In the early part of the session of 1660, the Virginia Assembly passed very stringent laws against the Quakers, forbidding them to come into the colony, on pain of being imprisoned without bail until they made oath to leave the country and give security to be forfeited should they ever return.[19] Many of these persecuted people moved from the Eastern Shore of Virginia into the Maryland half of the peninsula. Settlers continued to take lands along the boundary, and two years later we find the land commissioners above referred to before the council of Maryland, asking that their commissions for granting warrants be renewed.[20]

The request was granted, but a short time afterwards, Colonel Scarburgh's name was dropped from the commission.[21]

From the earliest times there had been some dispute on

[16] These shires were governed as the shires of England, lieutenants were appointed, sheriffs and bailiffs were elected. "Statutes at Large," W. W. Hening, Vol. I. p. 224.

[17] Colonel Scarburgh was an individual of some note. He had often been appointed Lieutenant of Accomack, was very successful in subduing the Assateague Indians on the coast of Virginia, and was surveyor general of Virginia when the boundary disputes began.

[18] "Archives of Maryland," Council Proceedings, 1636–1667, p. 435–436.

[19] "Statutes at Large," W. W. Hening, Vol. I, p. 532–3.

[20] "Archives of Maryland," Council Proceedings, 1636–1667. p. 452.

[21] *Ibid.*, p. 469.

the Eastern Shore, between the settlers in Maryland and those in Accomack, as to the dividing line. Shortly after the Maryland colony was planted, there seems to have been encroachments upon Virginia's territory south of Watkins Point. It appears that Governor Harvey acquiesced in this trespass on Virginia's land, for in 1638, with the advice of his council, he issued a proclamation declaring the eastern portion of the boundary of Virginia to be the river Anancock and commanding the inhabitants not to trade with the Indians north of this limit which was south of Watkins Point. Soon after this, Virginia took unopposed possession of Smith Island, which lies in the Chesapeake Bay, far north of any possible line described in the charter of Maryland. Virginia still holds a portion of this island.

A letter from the Protector to the Virginia authorities, just previous to the downfall of the Commonwealth, contained an injunction against further contentions concerning the matter.[22] This advice was not followed. In 1663, the Virginia Assembly passed an act "concerning the bounds of this colony on the Eastern Shore." This ordinance commanded: "That publication be made as soon as possibly by Col. Edmund Scarburgh, His Majesty's Surveyor General of Virginia, commanding in his majesty's name, all the inhabitants of the Eastern shore of Virginia, from Wattkins point southward, to render obedience to his majesty's government of Virginia, and make payment of rents and all publique dues. And, whereas it hath bin controverted by some ignorant or ill disposed persons where Wattkins point, the Lord Baltimore's southernmost bounds of the Eastern shore is scituate, this grand assembly by the care and special enquiry of five, able, selected surveyors and two burgesses, and, on the due examination thereof, conclude the same place of Wattkins point to be the north side of Wicomicoe river on the Eastern shore, and neere unto and on the south side

[22] "Statutes at Large," W. W. Hening, vol. i, p. 426.

of the streight limbe, opposite to Paotuxent River. Which place, according to Capt. John Smith and discoverers with him in the year 1608 was so named."[23]

Col. Scarburgh executed this commission promptly, and taking with him more than forty horsemen, "for pomp of safety," he came to the little settlement called Annamesseks on Sunday night, October 11, 1663. The next morning he called at the house of Stephen Horsey, an officer of Lord Baltimore. Horsey could not read, and after Scarburgh had read the act to him many times, he still claimed to be a citizen of Maryland, whereupon he was arrested and the "broad arrow" [24] was placed on his door. Then this Eastern Shore warrior, called upon Mr. Ambrose Dixon, a caulker, and other Quakers, demanded their allegiance, but they staunchly refused to submit to the colony from which in all probability they had been driven. After marking a few doors with the "broad arrow," including the cooper's, the caulker's, and the leather dresser's; Scarburgh proceeded to Monanoakin, where all the villagers, save Elzey and Capt. William Thorne, submitted to him.[25]

It is probable that the act of 1663 was passed largely through the influence of Scarburgh, but his execution of it was in violation of its chief provisions. The act provided that a conference should be held with Lord Baltimore's representatives to determine the location of Watkins Point. There is no evidence of Scarburgh having sought a conference with the Maryland authorities.[26] He

[23] *Ibid.*, vol. 2, p. 183.

[24] Denoting the confiscation of his property.

[25] "Scarburgh's Report to the Virginia Assembly," 1664. Copied from records of Accomack County in 1871, and published in "The Boundary Line Report." Maryland Senate Documents, 1874; Document E, p. 225.

[26] In his report Scarburgh says: "I suppose according to ye Act of Assembly, there ought to have been a meeting on ye Eastern Shore, w'ch ye Quakers say is contemned, what ever my own person may bee, I presume ye officer I pr'sent is not so unworthy, nor ye persons of those joynee with me, nor when they come to try all shall finde ye affair negotiated with less repute than becomes such a concerne." *Ibid.*

hated the Quakers intensely,[27] and was so unscrupulously jealous of Virginia's rights that he made oath that Watkins Point was above the mouth of the Annamessecks and not of the Pocomoke River; also, that the Pocomoke had never been known as the Wighco. This oath plainly varied with Smith's map, which placed the point on the mouth of the Wighco, which was undoubtedly the Pocomoke River.

Remonstrance against Scarburgh's proceedings ("beating, abusing, and imprisoning the people of Annamessecks and Monanoakin") was made June, 1664, by Governor Calvert to Governor Berkley. The reply of Berkley was that Scarburgh had no authority from him to act alone or proceed by force. Governor Calvert appointed boundary commissioners, Philip Calvert and Jerome White, to meet similar commissioners appointed by Virginia. On the date agreed upon, May 10, 1664, all the members of the Virginia Commission were not present and no action was taken. Governor Calvert then sent Philip Calvert, his Chancellor, in person to the Governor and Council of Virginia. He was empowered to treat concerning Watkins Point, to demand justice against Scarburgh for attempting to mark a tree upon a point of land thirty miles north of Watkins Point; also for his conduct in Annamessecks and Monanoakin.[28] Furthermore he was to ask the Virginia Assembly not to interfere in affairs concerning the government of Maryland.

The requests of Maryland were evidently heard, for we find Philip Calvert on the part of Lord Baltimore's province, and Colonel Scarburgh on the part of Virginia, acting as commissioners to determine the location of Watkins

[27] Scarburgh calls some of these people "Creeping Quakers" whose conscience would not serve to dwell amongst the wicked," and accuses them of gross ignorance and immorality. *Ibid.*, p. 226–231.

[28] "Archives of Maryland, Proceedings of Council," 1636–1667 pp. 496–7.

Point, and to mark the boundary line between the two colonies.

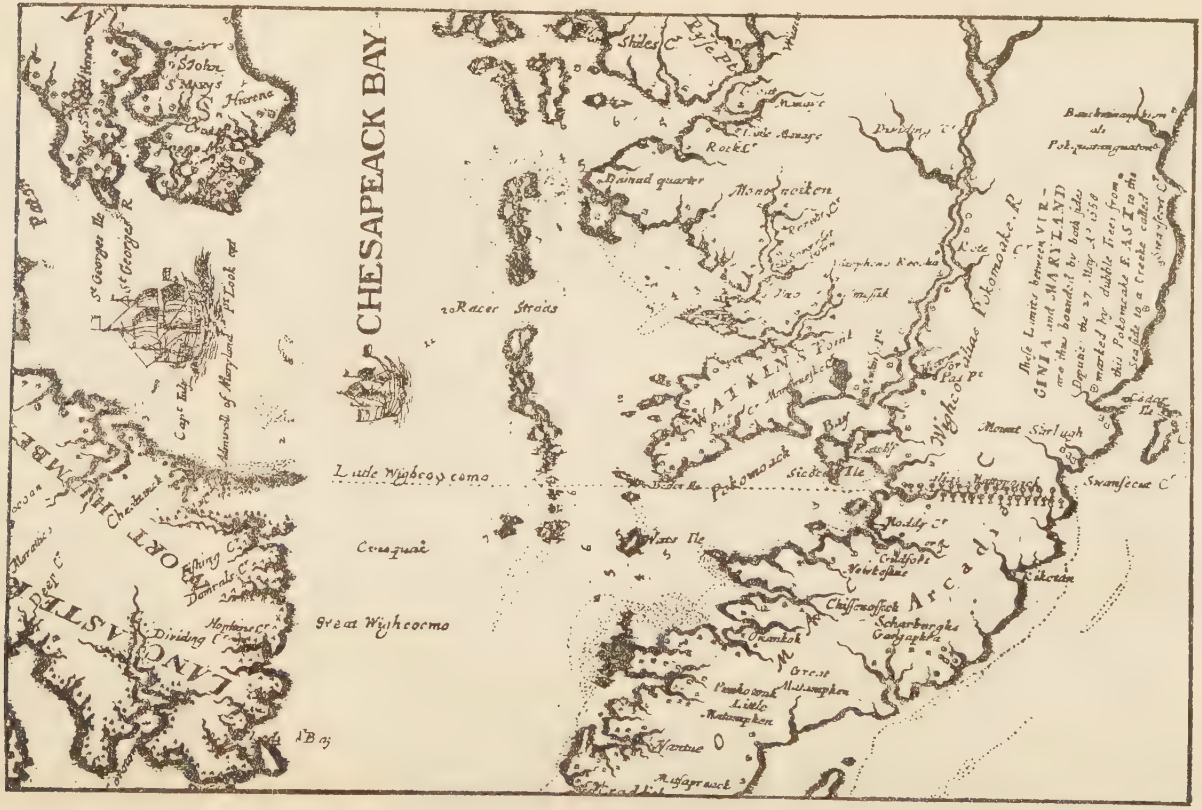
By their commission they were instructed "to meet upon the place called Watkins Point and thence to run the divisional line to the ocean." These instructions were partly carried out, and in June, 1668, the commissioners made a report of their proceedings.[29] The agreement signed by both parties states that, "After a full and perfect view taken of the point of Land made by the North side of Pocomoke Bay and south side of Annamessexs Bay, have and do Conclude the same to be Watkins Point; from which said Point so Called, we have run an East Line agreeable with the extreamest part of the Westernmost Angle of the said Watkins Point over Pocomoke River, to the Land near Robert Holston's, and there have marked Certain Trees which are so Continued by an East Line Running over Swansecute Creek into the Marsh of the Sea Side with apparent marks and Boundaries which by our mutual Agreement according to the qualifications aforesaid are to be Received as the Bounds of Virginia and Maryland. . . . on the Eastern Shore of Chesopeak Bay."[30]

The line run by these two commissioners, known as the "Calvert-Scarburgh Line" was the first attempt of the two colonies to mark their common bounds. During the years that intervene, the date 1668 has been regarded as a landmark in the boundary history of these states. But the commissioners did not do their work well. They were instructed to run a line from Watkins Point to the ocean, and they ran only a part of this line, as is shown

[29] "Archives of Maryland Proceedings of Council," 1667–1668, p. 44.

[30] These commissioners also drew up another agreement which settled in advance controversies about land holdings in consequence of the definite line now drawn. *Ibid.*, p. 45.

These two agreements were signed by both Calvert and Scarburgh, and subsequently ratified by the legislatures of both colonies. This bare record, however. is all that remains of their transactions; no journal, map, plat, mention of names of surveyors or certificates or survey can be found.



REPRODUCTION OF PART OF AUGUSTIN HERRMAN'S MAP 1670.

This map differs but little from Smith's map. It is important as showing the Calvert-Scarburgh Line of 1668 (p. 18), and it identifies the Wighco with the Pocomoke River. The boundary hereon starts from the southern head-land of the Potomac and not from Cinquack. The greatest error of the map is that the boundary indicated follows a due east course, thus placing Swansecut Creek on the same parallel as Smith's Point or southern head-land of the Potomac. (See map marked by arbitrators p. 42).

by their articles of agreement and by subsequent surveys. Calvert and Scarburgh seem to have agreed to the location of the Point, and then to have guessed where a line extending eastwards from it would cut the Pocomoke River some four miles away. Only between this river and the ocean did they actually survey and mark the boundary.

III

First Fountain of the Potomac 1698-1776.

The boundary dispute centers around the location of Watkins Point on the eastern and the determination of the first fountain of the Potomac River on the western end of the line separating Maryland and Virginia. In view of the work of Calvert and Scarburgh in 1668, the controversy respecting Watkins Point remained in abeyance for a time. The location of the first fountain of the Potomac became an issue between Lord Baltimore and the claimants of the Northern Neck. This was a portion of Virginia granted to the Earl of St. Albans and others in 1649, also in 1669 by King Charles II, and comprised the territory between the rivers Rappahannock and Potomac. The patent was merely a grant of title to land, and by the terms of that instrument matters of jurisdiction and government were reserved to the Virginia authorities.[31] Lord Fairfax became possessed of the Northern Neck by his marriage with the daughter of Lord Thomas Culpepper to whom a new grant had been made in 1688 by King James II.

In 1730, the Virginia House of Burgesses made a complaint to the King, and stated that the head springs of the Rappahannock and Potomac were not yet known.

[31] These grants are recited in "Statutes at Large," by W. W, Hening, vol. II. pp. 523–579, and in "De Jarnette Papers," 1675, No. 94.

Three years later Lord Fairfax petitioned the King to have the bounds of his grant determined. Six commissioners were appointed, three representing the King, and three on behalf of Fairfax. In 1736, the survey was completed and reports were made to the effect that "the said boundary ought to begin at the first Spring of the South Branch of the River Rappahannock, and that the said boundary be thence drawn in a straight line northwest to the place in the Allegheny Mountains where that part of the Potomac River which is now called Cohongoroota first rises."[32] This report was confirmed by the King, and commissioners were appointed who, in 1746, marked the line and planted the stone known as the "Fairfax Stone," on the upper or north branch of the Potomac.

Charles, Lord Baltimore, was not represented and had no part in the work of this commission. His son Frederick, however, wrote to Governor Sharpe of Maryland in 1753, claiming to the further bank of the Potomac, and insisting upon its south branch as its first source. The Governor was directed to look into the matter, to correspond with Fairfax as to a proper settlement, and persons who should "venture to settle in such disputed boundary between Maryland and Virginia,"[33] were warned.

Pursuant to these instructions, the Maryland Council began an inquiry concerning the lands in question and the sources of the river. From Governor Sharpe's correspondence, it appears that Col. Thomas Cresap, a settler who lived near the territory of Lord Fairfax on the upper Potomac, was summoned and questioned concerning the country.[34] Cresap gave his opinion that the south was

[32] "History of the Valley," Samuel Kercheval, p. 221, containing "Faulkner's Report."

[33] "Report of the Committee on the Western Boundary of Maryland, 1889," Wm. Hand Browne and Albert Ritchie, Appendix B, p. 34–35.

[34] "Archives of Maryland," Correspondence of Governor Sharpe, vol. I, pp. 1–7.

the longer branch of the Potomac, and extended some sixty miles farther to the northwest. Then a proposal to settle the dispute was made to Lord Fairfax, who replied that the question was one for the governors to decide, adding that it would probably be to his advantage to have the south rather than the north branch. He very likely thought an extension westward would overbalance what he would lose by surrendering his claim northward. Col. Cresap surveyed the head waters of the Potomac and, in 1754, sent to Governor Sharpe a "plan and certificate concerning the north branch of Potowmack and the temporary line as run by him." [35] These preparations for maintaining the claims of Maryland were discontinued by the outbreak of the French and Indian War.

In a letter to Lord Baltimore, in 1756, Governor Sharpe said, "I do not in the least doubt, both from what I have myself seen and heard, that the South Branch ought to have been deemed the Spring Head and Boundary of Maryland, though the commissioners appointed by the Crown to examine it determined otherwise. The Virginians will most certainly oppose any alteration or resettlement. Lord Fairfax is indifferent, and no survey can at this time be safely made within eighty miles of the South Branch by less than a body of 100 or 200 men." [36]

For awhile all proceedings lay dormant, and concern for the common safety allayed all minor disputes. The war, however, was of short duration, and its close should have given an opportunity for a final adjustment of the boundaries, but this was prevented by two orders prohibiting grants of land. First the King issued a proclamation that no land lying west of the headwaters of rivers flowing into the Atlantic should be granted. This order was in consequence of an agreement made with the Indians, and the necessity of adjusting the colonial boundaries. Second, Lord Baltimore stopped the grant-

[35] *Ibid.*, p. 72 and map.
[36] *Ibid.*, p. 452.

ing of lands beyond Cumberland, reserving to himself a manor of some 10,000 acres in that part of Maryland.

Fairfax held the Northern Neck under the royal government of Virginia, and claimed that his territory extended to the north branch of the Potomac River.

The Maryland claim to the south branch of the Potomac, as the boundary and also as the first fountain of the Potomac had not thus far been effectively asserted. Here closed the dispute between Fairfax and the Governor of Maryland, but the same controversy continued after the Revolution with the sovereign states, Maryland and Virginia, as parties to the suit.

By the constitution of Virginia of 1776, it was declared that "the territories contained within the charters erecting the colonies of Maryland, Pennsylvania, North and South Carolina, are hereby ceded, released and forever confirmed to the people of these colonies, respectively, with all the rights of property, jurisdiction and government and all other rights whatsoever, which might at any time heretofore have been claimed by Virginia except the free navigation and use of the rivers Potomac and Pocomoke, with the property of the Virginia shores and strands, bordering on either of the said rivers, and all improvements which have been or shall be made thereon." Further, it was declared that "The western and northern extent of Virginia shall in all other respects stand as fixed by the charter of King James I, in the year 1609, and by the public treaty of peace between the Courts of Britain and France in the year 1763."[37]

Maryland acquired the rights of Lord Baltimore's patent in 1776, and became a state. In the first constitutional convention (October, 1776), the words "ceded" and "released" used in the Virginia constitution were taken into consideration. The convention declared Maryland unwilling to be the recipient of Virginia's bounty by resolving unanimously: "That it is the opinion of this

[37] Virginia Constitution, 1776, Art. 21, "Charters and Constitutions," B. P. Poore, Part 2, p, 1910-12.

Convention that the State of Virginia hath not any right or title to any of the territory, bays, rivers or waters included in the charter granted by His Majesty, Charles I, to Cecilius Calvert, Baron of Baltimore." [38]

IV

Compact of 1785.

There soon arose between these two states one of those questions which helped to call a stronger union into being than was contained in the Articles of Confederation. Virginia stretched across the lower half of the Chesapeake Bay, which was Maryland's only road to the sea, and rivers lay along their boundary lines. The channels must be marked by buoys, light-houses must be erected, and break-waters made for common safety. The protection to shipping and the punishment of crime could only be regulated by mutual agreement. Daniel Jenifer, Thomas Stone and Samuel Chase were appointed by the Maryland Assembly, in 1777, to meet George Mason and Alexander Henderson on the part of Virginia, for the purpose of drawing up agreements to regulate traffic, and to protect commercial interests upon the waters of the lower Chesapeake, and to control the navigation of the rivers Pocomoke and Potomac." [39]

As far back as 1642,[40] the two colonies had entered into an agreement concerning the trade and barter of imported articles, produce and slaves.

The above-named commissioners met at Mount Vernon, in General Washington's parlors, and drew up an agreement known as "the compact of 1785." This was primarily a commercial treaty that was ratified by both

[38] Journal of the Convention in "Laws of Maryland," 1776, A. C. Hanson.

[39] "Statutes at Large," W. W. Hening, vol. 12, p. 50.

[40] *Ibid.*, vol. 1, p. 237.

states and granted to each state certain powers which were subsequently exercised by Congress. This agreement stated that "the river Potomack shall be considered as a common highway for the purpose of navigation and commerce to the citizens of Virginia and Maryland. . . . The citizens of each state respectively shall have full property in the shores of Potomack River adjoining their lands . . . and the privilege of carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river; but the right of fishing in the river shall be common to, and equally enjoyed by the citizens of both states: *Provided* that such common rights be not exercised by the citizens of one state to the hindrance or disturbance of the fisheries on the shores of the other state; and that the citizens of neither state shall have a right to fish with nets or seines on the shores of the other."

This was an important provision for, as will be seen, the boundary dispute finally became concerned principally with the rights of fishing. Article ten bears upon the early form of the contention, and provides for the punishment of "all piracies, crimes or offences committed on that part of Chesapeake bay which lies within the limits of Virginia, or that part of the said bay where the line of division from the south of Potomack River (now called Smith's Point) to Watkins Point, near the mouth of the Pocomoke River, may be doubtful; and on the part of Pocomoke River, within the limits of Virginia, or where the line of division between the two states upon the said river is doubtful."[41]

The compact was re-enacted in the Virginia codes of 1849 (p. 452) and 1860 (p. 503), and has been again referred to by both parties as a land-mark in the dispute. From the importance that has been given to this agreement, it undoubtedly deserves to be considered the second land-mark in this boundary history. But this estimate

[41] "Statutes at Large," W. W. Hening, vol. 12, p. 50, and "Maryland Acts of Assembly," Chap. 1, 1785.

has not been altogether warranted. As to jurisdiction and navigation, the regulations were quite satisfactory. The compact locates Watkins and Smith's Points, but plainly says that the lines from either of these places "may be doubtful," thus prophesying the altercation which did in fact arise.

The main interest in the compact of 1785 is that it preceded the perfection of the union of the colonies into a stronger central government. The Articles of Confederation left too much power to the separate state governments, and the inadequacy of the powers granted in those articles is shown in the causes leading to the compact. In other words, the compact has more bearing on national history than on the history on the boundary dispute at this stage of its progress. Later, when the fishery rights came to be determined, we shall see that this agreement of 1785, as interpreted by the Supreme Court, decided the last point at issue in the long controversy.

V

Ineffectual Legislation
1785-1860

Soon after the Revolution, the gradual movement of the settlers farther westward raised the question of ownership of land between the two branches of the Potomac.

A measure of the General Assembly of Maryland, in 1787, resulted in the appointment of Francis Deakins, who was directed to lay out manors and such parts of the reserves and vacant lands lying to the westward of Fort Cumberland as he might think fit and capable of being settled and improved, in lots of fifty acres each." This was done, and the next year an act was passed for the distribution of these lots among the soldiers who had composed the

Maryland contingent in the Revolution. Section XV of this act declares: "That the line to which the said Francis Deakins has laid out the said lots, is, in the opinion of the general assembly, far within that which this state may rightfully claim as its western boundary; and that at a time of more leisure, the consideration of the legislature ought to be drawn to the western boundaries of this state as subjects of very great importance."[42]

The "time of more leisure" soon presented itself and, in 1795, Maryland began negotiations with Virginia. The General Assembly of that year appointed Messrs. Pinkney, Cooke and Key to meet a similar commission representing Virginia, to settle, by mutual agreement, the southern and western limits, and adjust the conflicting claims of the two states.[43]

Virginia replied to this by appointing Thomas Jefferson, John Marshall, Edward Randolph, Robert Brooke, Ludwell Lee, Bushrod Washington and John Taylor, to correspond with the Maryland commissioners, and promised that every exertion would be used to settle the dispute in a friendly manner.[44] Messrs. Pinckney and Cooke were unable to serve, and their vacancies were filled by Charles Carroll, of Carrollton, and J. T. Chase. These also refused to accept the position, and Mr. Key having become a resident of another state, the commission no longer existed. This experience was profitable, however, for in 1801 the Maryland Assembly vested the power to appoint commissions in the governor and council, and, as a result, new appointments were made.[45] It seems that this newly constituted commission never held a meeting.

Some correspondence took place between Governor Monroe of Virginia and Governor Mercer of Maryland.

[42] "Laws of Maryland," Wm. Kilty, 1788, ch. 44.
[43] "Laws of Maryland," 1831, Resolution 128.
[44] "Virginia Statutes," Samuel Sheppard, vol. 2, p. 69.
[45] "Laws of Maryland," 1831, Resolution. 126, 128.

In these letters it appears that Virginia had passed resolutions appointing a commission, but had restricted its powers to the settlement of the western end of the line.

In 1802 the Virginia House of Delegates had cited an act of the Maryland Assembly, which had been passed with a view to settlement of boundaries and rival claims. This citation was followed by a preamble stating that the Assembly was "uninformed as to any claim which the State of Maryland may have, or set up, to any territory or lands within the limits of this Commonwealth, as also the causes of any discontent which may have arisen with respect to the southern boundary of the said State, already so well known and established." Maryland's Governor was requested, by this act, to state his claims to Virginia's territory, and the causes which had brought about debate concerning their common boundary, "in order that a fair and equitable settlement" might be made. Further, a resolution was adopted appointing three commissioners to settle and adjust the western boundary of the two states.[46]

The next year the Virginia Assembly passed resolutions providing for the appointment of the commissioners, just spoken of, whenever Maryland should do the same. In this act likewise the Virginia Assembly did not recognize any disputed claims; yet expressed itself as "willing at all times to treat with respect any application coming from so respectable a source, even when they entertain no doubts themselves."[47] Three persons were appointed to collect testimony on the said boundary and report to the next General Assembly.

Governor Mercer, in a letter to Governor Monroe, ex-

[46] "Virginia Statutes," Samuel Sheppard, v. 3, pp. 395–469,

[47] John V. L. McMahon, in his "History of Maryland," at page 65, of vol. I, says: "Virginia was unwilling even to enter into a discussion of her right to the territory between the two branches, whilst Maryland went upon the broad principle of referring the whole subject to the commissioners." In the acts passed by Virginia in 1802 and in 1803 nothing can be plainer than the desire for friendly and equitable settlement.

pressed his surprise "that the executive and legislature of Virginia have remained unapprised at so late a date of any pretensions of the State of Maryland to a different boundary between them than that which had hitherto been permitted to subsist."[48] Governor Mercer afterwards became a member of the House of Delegates and, in 1803, he made a report in that Assembly touching the boundary. He regarded it as evident that Virginia would pass no measure admitting a discussion of the claim to the land between the two forks of the Potomac. There appeared to him no possible settlement until both states agreed as to the main branch. He says "as the Committee are furnished with evidence satisfactory to them, that a source of the northern branch had been discovered some distance further to the westward than that which has been hitherto reputed the corner south boundary of the state, which consequently, in a line running due north for more than thirty miles, till it intersects the Pennsylvania line might add considerably, not only to the jurisdiction but also to the property of the state." [49]

A temporary line running from the most westerly source of the north branch was proposed by Mercer but no action was taken. The suggestion of the former Governor does not seem to have received the attention due it, for after fifteen years had passed, his conditions were offered by Maryland to Virginia.

In 1818, an act was passed in Maryland providing for the appointment of commissioners (conditional on Virginia doing the same), to "commence at the most western source of the north branch of the Potomac River and to run a due north course." Also to adjust conflicting claims to territory.[50] The primary importance of this

[48] B. S. Pigman's report on the boundary, 1834, Appendix. "Laws of Maryland, 1831," Resolution 128.

[49] John F. Mercer's report on the boundary in Maryland House of Delegates, November Sess., p. 65, 1803.

[50] "Laws of Maryland," 1818, ch. 206.

In 1810 another feeble attempt was made to effect an adjustment. Maryland virtually repeated her act of 1801 which provided for the

act is that by it Maryland yielded the claim to the south branch which the Proprietors had always held to be the true source according to their charter. But it cannot be considered a generous offer, as many Marylanders have held it to be. The reason for the proposal was to gain territory. This is clearly shown in Mercer's report of 1803.

The proposition of 1818 passed unnoticed by Virginia until 1822, when an act was promulgated which directed three commissioners, "to commence at Fairfax Stone, on the head waters of the north branch of the Potomac River, and to run a due north course" in order to settle the western limits of the State.[51] This was not in accord with the Maryland act of 1818, since the Fairfax Stone was not planted at the source of the north branch of the Potomac. The commissioners, however, were appointed —Ezekiel Chambers and James Boyle for Maryland; T. F. Mason, H. L. Opie and H. Boye for Virginia.

A conference was held, in 1824, at Smith's Tavern, on the upper Potomac, near the Fairfax Stone, but the powers of both parties were so limited by their instructions that no agreement could be reached.[52]

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appointment of commissioners, but nothing came of it. ("Laws of Maryland," 1810, Res. 3.) The Virginia Assembly in 1816 passed an act to provide an accurate chart of each county and a general map of the Commonwealth. The Executive was authorized to cause a survey of the exterior bounds of the state to be made· ("Virginia Statutes," Samuel Sheppard, vol. 2, p. 460.) These two acts of minor importance are the only references to bounds until the act of 1818.

[51] "Acts of Virginia Assembly," 1822, chap. 14.

[52] The Virginia act of 1822 has often been characterized by Maryland writers as an evasion of the point at issue and the intentional cause of the failure of the commission. There seems scarcely sufficient ground for this statement, since the instructions to the Virginia commissioners were no more specific than those which the Maryland commissioners were to follow. This view is expressed in a letter of Governor John Tyler of Virginia to Governor Joseph Kent of Maryland in 1826. He says: "The failure of those measures to attain their purpose cannot be made a charge against either the one or the other state, but proceeded entirely from a defectiveness of powers with which the commissioners on both sides were entrusted." B. S. Pigman's report on the boundary, Appendix, 1834, No. 23.

James Boyle says, "The act of 1818, if acted under, will be an abandonment of the rights of Maryland to nearly an half a million acres of territory; it may be considered fortunate that the phraseology of the Virginia and Maryland laws have essentially differed from each other." The commissioners discovered that "the place of beginning embraced a section of country about one mile in width and thirty-six miles in length, which was deemed too important to be abandoned unless under express instructions to that effect.[53]

A new method of adjustment was now attempted. The offer made by the Maryland act of 1818 was closed by a repealing act passed in 1825.[54] But in the following year, March 7, 1826, the Maryland Assembly passed a number of resolutions for the appointment of commissioners and the adjustment of her western limits. In these resolutions it was provided that "in case of a disagreement between the commissioners appointed on the part of this State and on the part of the Commonwealth of Virginia, the executive of this State shall request the Governor of the State of Delaware for the time being to appoint an umpire, who shall be vested with full powers to settle and adjust the several matters in controversy." Maryland pledged herself to abide by the award on condition that Virginia did likewise. Some correspondence between Governors Tyler and Kent followed, but the act had no practical results.[55]

Maryland did not despair of reaching a final adjustment and soon passed a more comprehensive measure providing for a settlement of the difficulty. Again, in this act of 1832, Maryland proposed arbitration by the Governor of Delaware, and directed a select committee of five to investigate and report concerning the western and southern limits of the state.[56]

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[53] Report of James Boyle on the boundary in 1824.

[54] "Maryland Acts of Assembly," 1824–5, ch. 195.

[55] B. S. Pigman's report on the southern and western boundary, 1834. Appendices 22,23, 24.

[56] "Maryland Laws," 1831. Res. 126, 128.

The Maryland act of 1832 seems to have received no recognition from Virginia.[57]

In the following year Virginia passed an act relating to boundary disputes, but no mention was made of Maryland's offer.[58] Commissioners were directed to begin Virginia's boundary at the Fairfax Stone, and no provision was made for arbitration. This measure was discourteous to Maryland as it practically ignored the offer of that state to make a friendly adjustment. Maryland did not hamper her commissioners by any specific instructions under the act of 1832, while Virginia's legislature designated the place where the boundary should begin and so left nothing open to investigation. Maryland legislators felt keenly the force of the action taken by Virginia, and deep regret was expressed at the failure of all attempts to settle the dispute by friendly arbitration. The next move was an appeal to law.[59]

The Attorney-General was directed to bring a suit in the name of Maryland against Virginia in the Supreme Court of the United States in order that a "final legal adjustment and settlement of the southern and western boundaries" might be obtained. Provision was made "that all

[57] The Virginia Assembly had often sought to collect data bearing on the dispute, and in 1832 resolutions were passed by that body directing the Governor to procure certain documents and testimony. Among the papers specified was a record of the "Decision of the case brought before George II anterior to the American Revolution by the proprietor of the Northern Neck and the proprietor of the western domain of Maryland, in a dispute touching the limits and boundaries of several letters patent granted by King Charles II and James II for land lying on both sides of the River Quiriough or Potomac." Acts of Virginia Assembly, 1831–2, ch. 6, 94, 186.

Governor Floyd attempted to secure this testimony from the British records, through the United States Minister at the Court of St. James. Mr. Charles J. Faulkner was appointed by the Governor as agent for Virginia, and he thereupon had an interview with President Jackson and Edward Livingstone, the Secretary of State. The effort was not successful. Samuel Kerchival's "History of the Valley," Faulkner's Report. Also "Journal and Documents of Virginia House of Delegates," 1832–3, Doc. I, p. 70–3.

[58] "Acts of Virginia Assembly," 1832–3, ch. 32.

[59] "Laws of Maryland," 1833–4, Res. 80.

proceedings on the part of Maryland against Virginia should cease at any time before the suit should be brought or previous to a final adjustment whenever Virginia accepted the offer of Maryland made in 1831."[60] The next year a special committee made a report on a portion of the message of the Governor of Maryland and set forth the plea that Virginia by her act of 1833 had intended to accept the overtures of Maryland. This misunderstanding caused the proposed suit to be withdrawn.

The withdrawal of the suit against Virginia and the restoration of amicable relations between these States was followed by several years of quiet as to boundary difficulties. For the next twenty years no attempt was made to reach a settlement or define the true line.[61]

During this time the lands about the headwaters of the Potomac were being quite rapidly occupied. The provisional line of 1787 had become almost obliterated, and many contentions had arisen between the settlers. Both states had often granted patents to the same piece of land, and suits of ejectment had been brought by those holding warrants from one state against grantees of the other.

The discussion was begun anew by Maryland in 1852, when the General Assembly directed the Governor to correspond with Virginia's Executive in reference to establishing the line "intervening between Smith's Point at the mouth of the Potomac River and the Atlantic Ocean, which has from the lapse of time become uncertain, thereby involving innocent parties in difficulties by them irremediable." Another act in the same year

[60] *Ibid.*

[61] The subject was not held altogether in abeyance during these years. In 1835 the Governor of Virginia was directed to purchase a number of documents referred to in the report of Faulkner made in 1832. These documents all related to the boundary and set forth Virginia's claims. "Acts of Virginia Assembly," 1835. It appears that these documents were purchased and filed in the State Library at Richmond. They have not been accessible since the Civil War, and it is alleged that the Federal Army destroyed or removed these papers during its occupancy of the capitol.

authorized a commissioner to be appointed (should Virginia appoint one) to run and mark the boundary "beginning therefor at the said Fairfax's Stone and running due north." [62]

This act marks an entire change of attitude on the part of Maryland. When the boundary dispute began, Virginia claimed the north branch of the Potomac to be the first fountain. Maryland had the headwaters of that river surveyed, and plainly claimed the south branch to the first fountain. No compromise could be made on these terms. During the first quarter of the nineteenth century Maryland offered to begin the boundary on the north branch, relinquishing all claim to the south branch, Maryland made this concession, hoping to gain territory by an extension further westward. Virginia's reply was that the line must begin not only on the north branch, but at the Fairfax Stone.

Maryland refused for more than twenty-five years to accept these terms because they defeated her hopes of expansion westward. By the act of 1852, Maryland yielded to Virginia's claims, and directed that the line begin on the north branch and at Fairfax Stone. A speedy settlement of the dispute might justly have been expected to follow, but it did not.

Virginia answered Maryland in 1854, accepted her offer, appointed a commission, and directed them to begin the boundary at Fairfax Stone.[63] But this commission did not perform their appointed task. Four years later an amendatory act was passed enlarging the scope of the commission and directing them to run the line between the mouth of the Potomac and the ocean and also the line from Fairfax Stone.[64]

This last act showed that attention was now being directed to a new source of controversy, namely, the

[62] "Laws of Maryland, 1852," ch. 60, 275.

[63] "Virginia Acts of Assembly," ch. 1, 1853–54.

[64] "*Ibid.*." 1857–58, ch. 3.

ownership of the Potomac River and the line thence to the ocean. The Civil War gave birth to West Virginia, and the Fairfax Stone, together with the unlocated western boundary, were among the heritages of this new State.

For more than a hundred years there had been successive attempts made to define this boundary which was originally between Maryland and the Northern Neck, and later between Virginia and Maryland. Virginia gained her claims in the end and thus made the territory of West Virginia larger. When the decision of the United States Supreme Court is rendered in the case pending (1904) between Maryland and West Virginia, there will doubtless be little variation from the line now laid down on all our maps.

Maryland and Virginia, however, did not stop here in their boundary difficulties, but soon found occasion for disputes which have brought the matter down to the present time.

VI

Settled by Arbitration.

1860-1884

Just before the Civil War, the controversy between Virginia and Maryland began to turn from the western end of their dividing line to that portion which crosses the Chesapeake Bay.[65]

[65] A small part of the bay line was laid down in 1835, on Smith's Island, which lies near the eastern side of the Chesapeake. The county court of Somerset County, Maryland, appointed commissioners "to lay off such of Smith's Island as lies within the body of this county into a separate and additional election district, before April 1st, 1835." A line was run dividing the island into a northern and a southern portion, and the report of the commissioners was confirmed during the same year. Another interpretation of the limit of the claims of the two states occurred in 1854. In the eighth judicial circuit of Maryland, before the circuit court, in October of that year, two cases were decided. John Tyler, a citizen

Both States had made attempts to locate all of the line except that part running between the mouth of the Potomac and Watkins Point on the Pocomoke River. Up to this time the dispute had concerned rival landed interests, but from the Civil War to the settlement of the dispute riparian rights and especially oyster fisheries were the subject of controversy. The line dividing the great bay between the states was to decide ownership of many square miles of oyster beds and natural rock,[66] worth millions of dollars, and far more productive of wealth than their area doubled or trebled in the best farm lands.

In 1858, Virginia appointed Col. A. W. McDonald to act with one commissioner from Maryland, and to "begin at Smith's Point at the mouth of the Potomac, and run thence to the Atlantic Ocean, to form the eastern line, and from Fairfax Stone north to form the western." [67]

Maryland responded by appointing Mr. Thomas J. Lee. The commissioners secured the services of Lieut. N. Michler of the corps of United States topographical engineers, who surveyed, retraced and marked the line. Michler found many traces of the work of Calvert and Scarburgh between the Pocomoke River and the ocean, and certain large oaks, known for miles around as "marriage trees," were pointed out as marking the dividing line.

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of Virginia, was found dredging oysters at Tilliby's Rock, north of the Great Rock in Tangier Sound, far north of the southern end of Smith's Island and Cedar Straits. He was seized and his schooner "Fashion" forfeited for violating the oyster laws of Maryland. Tyler was tried and acquitted. Tyler subsequently brought suit against a civil officer of Maryland, John Cullen, for his arrest and seizure. In this action Tyler recovered $1,000.00 damages against Cullen. This was a legal decision sustaining Virginia's claims to a large part of Tangier Sound. "Final Report of Virginia Boundary Commissioners, 1874." pp. 20–21.

[66] The term "natural rocks" is used by oystermen to denote a pile of oyster shells, formed by nature in the water. On these shells young oysters fasten themselves and the oyster supply is at present thus furnished. "The Oyster," W. K. Brooks.

[67] "Virginia Acts of Assembly," ch. 3, 1857–1858.

"Under the shade of these trees," says Michler, "the most noted of all the boundary marks, and just across the line, youthful couples go to be united in holy wedlock, fleeing from the wrath of parents, or from stringency of marital laws, or perhaps for the new pleasure and excitement, they run away from home to commit an act of which many live to repent when too late." [68]

This is strong proof of the reputed location of a state boundary. Some thirty marks of the old Calvert-Scarburgh line were found between the ocean and the Pocomoke River. The line did not run due east, however, as was intended by the commissioners of 1688. Michler discovered that it ran from the Pocomoke north of east to the ocean, giving Virginia some twenty-three miles of Maryland territory.

No marks were found between the Pocomoke and Watkins Point or Tangier Sound. The commissioners had been instructed to retrace and mark the boundary between "Smith's Point, at the mouth of the Potomac, and the Atlantic," but the legislatures failed to give an intermediate site. The question as to the location of Watkins Point blocked all further proceedings. Michler made surveys in the vicinity of the line, and these with the reports of the commissioners were laid before the respective legislatures.[69]

In 1860 the Maryland legislature ratified Michler's survey, and declared the state boundaries to be as follows: the Calvert and Scarburgh line of 1688 for the Eastern

[68] N. Michler's report on the boundary. Document No. 21 of Virginia Senate Journal and Documents, 1859–60.

[69] Report of T. J. Lee on the boundary, 1860, and maps. Governor Wise of Virginia in a letter sets forth the claims of his state and the spirit of the act of 1858. He says: "I gave to the commissioner of Virginia the instructions which he will herewith report not to yield one foot of her territory which had not hitherto been ceded according to well known charters, conventions and grants, under the Crown of Great Britain or under the State sovereignties since the Revolution; but to make every just concession under the respective muniment of title." Document No. 21 of Virginia Senate Journal, and Documents, 1859–60, p. 6.

Shore; a line from Smith's Point across the Chesapeake to the southernmost angle of Watkins Point as part of the southern boundary; and from Fairfax Stone north, the western boundary.[70]

Virginia failed to ratify the report of the commissioners, but passed resolutions in 1860 providing that, if the governor should deem it necessary, permanent boundary marks should be erected, at the joint cost of the two States.[71]

The work of this commission did not result in a complete settlement. The commissioners located the boundary between the Pocomoke River and the Atlantic Ocean, but they found, on attempting to run the line from Smith's Point across the Chesapeake to the mouth of the Pocomoke, that there was no certainty as to where the line should strike the eastern side of the Chesapeake. In short, where was Watkins Point?

In 1867, Virginia directed a commission to trace the boundary from Watkins Point across Smith's Island to the Potomac; also from the same point to the ocean. Messrs. John W. Field, Thomas H. Kellam and Samuel W. Powell, were appointed to act jointly with a similar commission appointed on the part of Maryland. The Maryland Assembly, during the following year, appointed Messrs. Isaac D. Jones, William J. Aydelott, and Levin S. Waters. Mr. John De La Camp, an assistant of Lieut. N. Michler in 1858, was engaged as surveyor, and a line crossing the peninsula was laid down.

At this juncture there arose a conflict of claims involving the oyster interests. The Maryland commissioners insisted on a line being drawn from Smith's Point to the southernmost angle of Watkins Point. The southernmost

[70] "Laws of Maryland," 1860, Ch. 385.

[71] Col. A. W. McDonald was sent to England to gather evidence concerning Virginia's boundaries. He collected the McDonald Papers, which in 1897 were still in manuscript in the State Library at Richmond, Va., in five volumes.

angle or point is about four miles south of the westernmost point which Virginia claimed as the boundary. To have agreed to Maryland's demands would have meant the surrender of Virginia's rights on Smith's Island and about forty square miles of valuable oyster ground in the Chesapeake Bay and Tangier Sound. In a report of Messrs. Field and Powell,[72] we find it stated that "Virginia has never conceded the right of Maryland to any of the waters of Pocomoke Bay, and consequently your commission claimed all the waters of said Bay." It was also held that Virginia had never recognized Smith's Point as the beginning of the Chesapeake Bay line, except in the compact of 1785, and then only in reference to the use of the Potomac River. The commissioners were unable to compromise their differences, and adjourned.[73]

In 1870, Virginia passed a measure setting forth the fact that the location of the boundaries between Virginia and the States of North Carolina, Tennessee and Maryland had become uncertain and disputed. These lines had been "historically described as running between certain initial and intermediate points in certain parallels of latitude," and they could "only be truly located by accurate scientific survey." The executive of the state was directed "to apply to the United States Government for the assignment of a competent corps of surveyors to the duty of ascertaining and locating the true lines between Virginia and the above States." Two commissioners were appointed to confer with the surveyors and delegates from the other States. In the following year, the number of commissioners was increased to three, and the states interested were invited to make similar appointments for the purpose of conference.[74] Messrs. Henry

[72] Thomas H. Kellam died before the report was made.

[73] Report of John W. Field on the boundary. Doc. No. 8, Virginia House of Delegates, 1869–70.

[74] "Virginia Acts of Assembly," 1870–1871, Ch. 65.

A. Wise, D. C. DeJarnette, and William Watts were appointed on behalf of Virginia to confer with Messrs. Aydelott and Waters, the Maryland commissioners, appointed in 1868.

Former Governor Wise, in a letter of December the sixth, 1870, to Mr. Aydelott, asked that the proposed meeting of the commissioners be postponed until proper time could be had to study the documents bearing on the titles of both states.

In January of the following year, the newspapers of Richmond announced that the Virginia commissioners had discovered that much of the manuscript material obtained from England in 1860, by Col. A. W. McDonald, in reference to the boundary, had disappeared.[75]

Mr. DeJarnette procured from England a part of the missing documents, and the commissioners of Virginia having now obtained their material began their work with the Maryland members in the fall of 1871. Winter came on and the survey of the line was postponed. In February of 1872, the joint commission met, and the documents lately obtained were consulted. The Virginians claimed the entire Potomac River and to the Calvert-Scarburgh line. The Marylanders said that they were empowered to settle only the Eastern Shore boundary, and the conference ended for a time.[76] The General Assembly in the following April continued the commission, and gave it power "to settle and adjust the boundary line between the two states."[77]

The commissioners began their task in the spring of 1872. Joint meetings were held at Annapolis, Crisfield, Baltimore and Richmond. They went to Smith's Island and inspected the line stones at Horse Hammock. The

[75] Some of the volumes mentioned in note 71 have had many leaves and maps cut from them.

[76] Maryland Senate Journal, Senate and House Documents, Docs. W and X, 1872.

[77] "Maryland Acts of Assembly," 1872, Ch. 210.

greater part of their time, however, was given to historical research, examining maps and rummaging libraries to find evidence by which the claims of each state might be sustained. An agreement was made that the respective claims of Maryland and Virginia, as to boundary, be written out and presented in a joint meeting of the commissioners. Mr. Jones, on the part of Maryland, and former Governor Wise, in behalf of Virginia, presented claims. An attempt to reach a compromise then followed, but the Maryland members could not agree to terms of adjustment and the work of the commission ended.[78]

In the final report of the Virginia commissioners the claims of Maryland are stated as follows:

(1) "Maryland claims that by the charter of Lord Baltimore, the standpoint of the grantor was on the fortieth parallel of north latitude . . . that is granted."

(2) "She next claims that the line running north to the further bank of said river, necessarily ran to the right bank of the Potomac. Virginia claims that this could not be so from the course of the river, for by the survey of Michler,[79] the left or north bank was the further bank of the river, at the point where it was cut by the meridian of the first fountain thereof, traced from the parallel of forty degrees north latitude."

(3) "Maryland replied that whatever the map of the river at its source, the line was to be run to a place called Cinquack, and the river was not to be crossed by it, but the line was to continue on the same bank of its begin-

[78] For a full account of these attempts to compromise see "Journal of Proceedings of Boundary Commission," Maryland Senate Documents, Doc. E. "Report of the Commissioners to adjust the boundary line between Maryland and Virginia, 1874." p. 1–29.

[79] Michler in his survey found the Potomac at its first fountain running eastward, then northward, turning to westward and finally eastward again to the ocean. Of course a line from the fortieth parallel falling on the further bank, where the river flowed westward, would make the northern bank of the main stream the further bank. Boundary Report of 1874. *Supra.*

ning to that place; and that place was located at or near Smith's Point. To this Virginia replies, that the charter does not require that the line, on whichever bank of the river it was to run, should run to Cinquack; but that it required that the line should follow the same (further bank of the river on which it was to begin) on that side where 'the western shore looks toward the southern shore into a certain place called Cinquack, situate near the mouth of the same river.' Not to Cinquack but to a place where 'the western shore looked to the southern shore unto Cinquack' and 'Point Lookout' is the place, and only place, answering the description of the grant."

The commissioners followed this statement of points at issue, with an assertion of Virginia's claim to the whole of the Potomac, and held to Point Lookout, Smith's Island, the westernmost angle of Watkins Point, and the Calvert-Scarburgh line, as boundary marks.

"The territory and domain in dispute," said the commissioners, "involve a very large amount in value,—no less than all the water power, all the isles, all the alluvium and all the riparian rights, and rights of jurisdiction of the river Potomac; and forty square miles of territory between the Little Annamessex River and the head of Pocomoke Sound and on Smith's Island, and one hundred and fifty square miles of waters in the Chesapeake Bay and in Tangier and Pocomoke Sounds, including the main seed beds of oysters in the waters of the Chesapeake Bay and on the Eastern Shore. The total money value involved cannot be less than twenty millions of dollars." [80]

Both states now turned to arbitration as a means of adjustment, and, in 1874, acts were passed to that effect. The Hon. Jeremiah D. Black of Pennsylvania and Hon. Wm. A. Graham, of North Carolina, were appointed, and they selected Hon. Charles A. Jenkins of Georgia, as a third member of the Board of Arbitration. In 1876, the

[80] Report of boundary commissioners of 1874. *Supra.*

contending States agreed to the selection of James B. Beck of Kentucky in the place of Gov. Graham, who had died in the meantime. Each State had the right to be represented by counsel before the arbiters. Former Governor William Pinkney Whyte and I. D. Jones were counsel for Maryland, and the attorney-general of Virginia appeared on behalf of his State.

The temporary line known as the "Lovett-Davidson Line" was to be observed until the award was made, and both states pledged obedience to the decision of the Board.[81]

Maryland pledged her obedience with the proviso "that neither of the states, nor the citizens thereof, shall by the decision of said arbitrators, be deprived of any of the rights and privileges enumerated and set forth in the compact between them entered into in the year 1785." [82]

In 1876 an additional provision was made by both States "that the land holders on either side of the line of boundary, as may be ascertained and determined by the said award, shall in no manner be disturbed thereby in their title to and possession of their lands." [83]

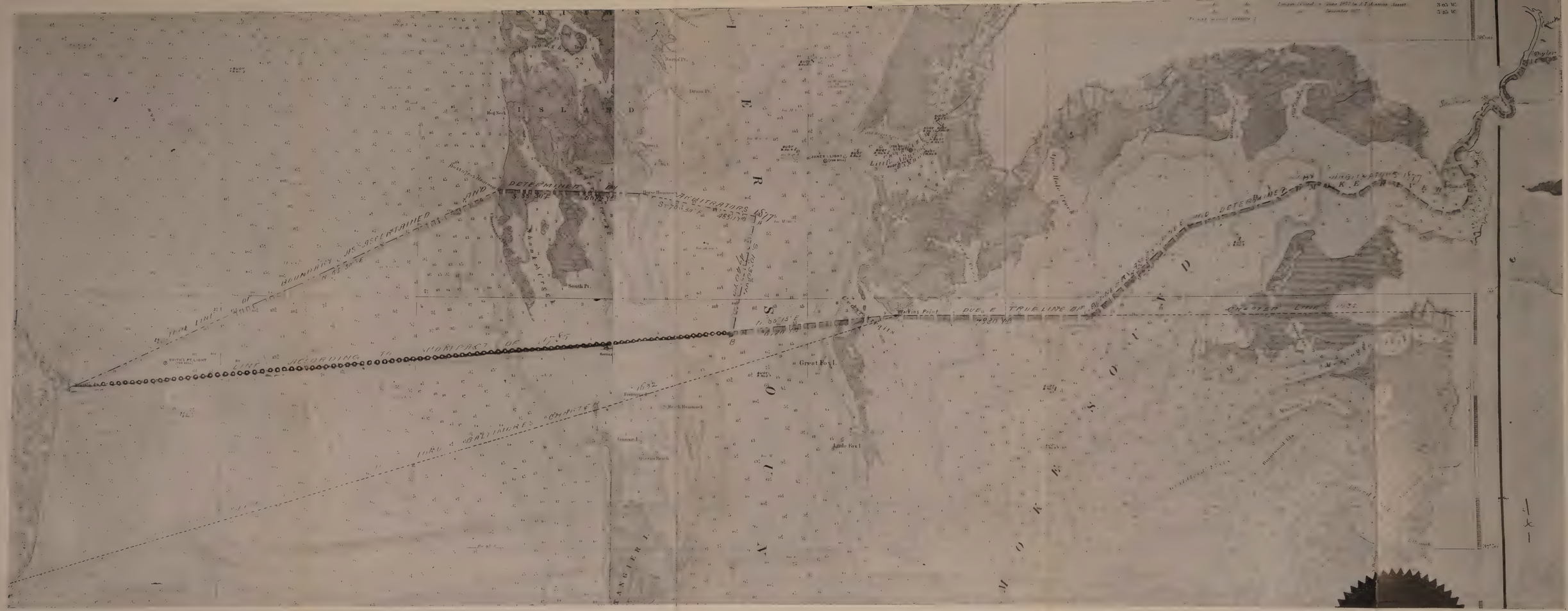
On January 16, 1877, the award was made,[84] stating that, "having heard the allegations of the said States and examined the proofs on both sides, we do find, declare, award, ascertain and determine that the true line of boundary between the said States so far as they are conterminous with one another, is as follows, to wit: BEGINNING at the point on the Potomac River where the line between Virginia and West Virginia strikes the said river at low water mark, and thence following the

[81] Lovett was chief oyster inspector for Virginia, and Davidson was commander of the Oyster Police Force of Maryland, and they agreed to a temporary line Dec. 11, 1868.

[82] "Laws of Maryland," 1876, ch. 198, "Acts of Virginia Assembly," 1876, ch. 247.

[83] Maryland Acts of Assembly, 1874, p. 444, 1876, ch. 70, 198; and Virginia Acts of Assembly, 1874, pp. 116, 135, 226, and 1876, ch. 247.

[84] See map marked by arbitrators opposite.



REPRODUCTION OF PART OF MAP MARKED BY ARBITRATORS 1877.

This map embraces a cross-section of Chesapeake Bay, beginning at the mouth of the Potomac River on the left; it takes in part of Smith's Island, of Tangier and Pocomoke Sounds, ending at Taylor on the Peninsula on the right.

Hereon are shown three boundary lines. The line indicated in the Maryland Charter in 1632, starts from Cinquack in the lower left-hand corner; thence to Watkins Point and from Watkins Point due east to the Ocean. Calvert and Scarburgh intended to mark this line across the peninsula, in 1668, but it was found that they really laid down a dividing line some four miles further north and began at Taylor, in the upper right-hand corner, and proceeded due east to the Ocean.

The line indicated by the compact of 1785, begins at Smith's Point, the lower head-land of the Potomac, some three and a half Cinquack, and ends at Watkins Point.

The arbitration line also begins at Smith's Point and;—proceeding further north than any previous line;—crosses Smith's Island (p. 34, note 65), lying in Chesapeake Bay, abruptly turns southward from an arbitrary point in Tangier Sound, intersects the line of 1785, thence to Watkins Point. From Watkins Point the arbitrators laid down a line which divides the Pocomoke River between the States up to Taylor where the Calvert-Scarburgh Line is followed to the Ocean (Chap. VI., p. 42–43). The course chosen through Tangier Sound and Pocomoke River was determined by a desire on the part of the arbitrators to divide those waters and their valued oyster fisheries between the States. Pocomoke Sound was declared by the United States Supreme Court to be no part of Pocomoke River and Maryland was denied the right to the oyster fisheries of the Sound (p. 51).

meanderings of said river by the low-water mark to Smith's Point, at or near the mouth of the Potomac, in latitude 37° 53′ 08″ and longitude 76° 13′ 46″; thence crossing the waters of the Chesapeake bay by a line running north 65° 30′ east about nine and a half nautical miles to a point on the western shore of Smith's Island, at the north end of Sassafras Hammock; thence across Smith's Island to the center of Horse Hammock, on the eastern shore of Smith's Island; thence to a point marked 'A' on the accompanying map, in the middle of Tangier Sound; thence by a line dividing the waters of Tangier Sound to a point where it intersects the straight line from Smith's Point to Watkins Point. This point of intersection is marked 'B' on the accompanying map. Thence along the line above mentioned which runs from Smith's Point to Watkins Point until it reaches the latter spot, namely Watkins Point, which is in latitude, 37° 54′ 38″, longitude, 75° 52′ 44″. From Watkins Point the boundary line runs due east, to a point where it meets a line running through the middle of Pocomoke Sound, which is marked 'C' on the accompanying map; thence by a line dividing the waters of Pocomoke Sound, to a point in said Sound marked 'D' on the accompanying map; thence following the middle of Pocomoke River by a line of irregular curves, as laid down on the accompanying map, until it intersects the westward protraction of the boundary line marked by Scarburgh and Calvert, May 28, 1668, at a point in the middle of the Pocomoke River; thence by the Calvert and Scarburgh line to the Atlantic Ocean." [85]

In short, Virginia lost the Potomac, and to Maryland was given the south bank of that river. The part of Smith's Island claimed by Virginia was retained by her; Tangier and Pocomoke Sounds were divided between the two states, Virginia getting the larger share; the south-

[85] "Opinion and Award of Arbitrators on the Maryland and Virginia Boundary Lines," pp. 29–30.

ernmost and not the westernmost angle of Watkins Point was taken as the true Watkins Point, and Pocomoke River was divided between the states, up to where the Calvert-Scarburgh line began.

This award was accepted by Virginia and Maryland, and ratified by Congress. In 1882, Mr. Wm. J. Aydelott on the part of Maryland, and Mr. G. H. Bagwell in behalf of Virginia, were appointed commissioners to survey and mark the line according to the decision of the arbitrators.[86]

Col. F. V. Abbott of the Corps of Engineers of the United States Army surveyed the line, and the work was completed in 1883. Col. Abbott says of the line: "Our eastern terminus near the ocean is some eighty feet too far north; and the western terminus and location of our boundary on the east bank of the Pocomoke River is some two hundred and seventy-five feet too far south, thus gaining for Virginia a little strip, though nearly three times as much more is gained by Maryland." An old oak was found which had been marked by Calvert and Scarburgh in 1668, by Michler in 1859, and De La Camp in 1867, and finally by Abbott in 1883. Mr. Aydelott in his report speaks tenderly of this landmark and celebrated "marriage tree," adding "may the woodman ever spare that tree." [87]

VII

Fishery Rights in Common Waters and the Oyster Troubles to 1894

The line as laid down by the arbitrators seems to have settled all questions of dispute between Maryland and

[86] "Laws of Maryland," 1878, ch. 374, 1882, ch. 159. "Acts of Virginia Assembly," 1878–80, ch. 304.

[87] Report on the boundary by William J. Aydelott in "Maryland House and Senate Documents," Document K, 1884. Mr. Aydelott has had a number of iron spikes driven into the trunk of this tree, that the woodman might fear to spoil his axe in felling this ancient land-mark.

Virginia with the exception of one, namely, the fishery rights of each State in the waters which were, according to the award, their common boundary.[88] The oyster industry, more than any other was the particular fishery which led to a dispute and open conflict, followed by a decision of our highest judicial tribunal.

Virginia passed laws for the preservation and protection of the oyster interests as early as the beginning of the nineteenth century. In 1819 all former acts were reduced to one, which provided for the preservation of oysters within the commonwealth.[89] In 1832 an act was passed for the protection of the oysters in Accomack and Northampton Counties.[90] An act in 1864 forbade all persons other than actual residents and inhabitants of Virginia to take oysters in the waters of Accomack County, except in those parts known to be common to Virginia and other states. The act of 1852 prohibited citizens of Virginia from taking oysters with dredges in Tangier and Pocomoke Sounds, in the County of Accomack. In 1867 an act gave to Virginians the exclusive privilege of planting oysters in the rivers of the state, or in the Pocomoke or Potomac.

On September 27, 1870, James Browne, the Virginia Oyster Inspector of the Third District, seized ten Maryland vessels for the violation of the oyster laws. These boats according to Browne's statement were found oystering in the Tangier Sound south of the divisional line established by Messrs Davidson and Lovett in 1868.

Some correspondence followed between Governors Bowie of Maryland and Walker of Virginia. Maryland's executive asked that the vessels be released and

[88] The question of fishery rights might seem to be a distinct subject and not a part of the boundary controversy, but the act of the Virginia Assembly in 1882 shows that indefiniteness in the boundary award brought about a continuation of the old controversy in a new form.

[89] "Virginia Code," 1819, vol. 2, ch. 255.

[90] "Acts of Virginia Assembly," 1831–2, ch. 186.

no new arrests be made until the disputed waters were marked and the matter decided. Governor Walker replied that they were violators of the law, since they were found below the temporary line.[91] Governor Bowie, in a letter to Governor Walker, set forth the complaint of citizens of Somerset County, Maryland. A number of these people had suffered, by the execution of Virginia laws, for taking oysters in Pocomoke Sound and River. Marylanders had been in the habit of fishing and oystering in these waters from time immemorial, and now that Virginia disputed this right, they seemed threatened with starvation.[92]

So many depredators and trespassers were captured, and their boats confiscated, that it became a serious affair, and the Governor of Virginia in his message to the general assembly in 1870, called attention to the matter. Resolutions were passed directing the Governor of Virginia to discharge from custody the citizens of Maryland arrested for violation of the laws of Virginia. The Marylanders were released and their confiscations were restored.[93]

In the early part of 1872, The Virginia Assembly passed an act which set forth that "no persons, other than a citizen of this state, shall catch terrapins or clams, catch, take or plant oysters in the Rivers Pocomoke or Potomac, —and any resident shall be deemed to have violated this section—but this shall not extend to a citizen of Maryland taking oysters in the two above-named rivers, and shall not be construed to give to citizens of Maryland the right to catch, take or plant oysters in any creek, cove, or inlet, tributary to said rivers.[94]

A similar provision was enacted by the Virginia Assem-

[91] "Journal of Virginia House of Delegates," Dec. 19, 1869–70.

[92] "Virginia House Journal and Documents," Doc. No. 6, p. 1. 1870.

[93] Brief of R. T. Scott, Attorney General of Virginia. Wharton v. Wise, 153 U. S. 155.

[94] "Acts of Virginia Assembly," 1872, ch. 191.

bly in 1874, and at the request of the Governor in 1875, the Assembly defined the meaning of the above clause to be: (1) "To confer upon citizens of Maryland the privilege of taking oysters in the Potomac and Pocomoke Rivers and not in Pocomoke Bay or Sound. (2) That in insisting and declaring that the true line between this State and the State of Maryland, east of the Chesapeake Bay, is the line known as the Calvert and Scarburgh line and that a part of the County of Somerset claimed by the State of Maryland is south of that line and of right part of the territory of Virginia; yet in a spirit of comity and good will to a sister State, be it further enacted that the privilege of taking oysters in Pocomoke Bay shall be enjoyed by citizens of Maryland in common with the citizens of Virginia, north of a right line running from Cedar Straits to the intersection of the Calvert-Scarburgh line with the Pocomoke River." This privilege was to be withdrawn at the pleasure of the Virginia Assembly.[95] This act makes the very important distinction between Pocomoke River and Pocomoke Sound and defines clearly the rights of Maryland as recognized by Virginia.

In 1882 an act was passed by the General Assembly of Virginia stating that "uncertainty still exists as to what is the real boundary line between the states of Maryland and Virginia along the Potomac River, by reason of the failure of the arbitrators, . . . to define and limit the meaning of the term 'headland' as used in the said award, or to locate such headlands upon the plat filed; in consequence whereof the jurisdiction of said states is still in doubt, and litigation and conflict is constantly arising on said waters."[96] A joint committee composed of members of the Virginia Assembly and the Maryland Legislature met and drew up resolutions which Virginia accepted. Maryland, however, dissented from these resolutions and Virginia, in 1884, repealed

[95] "Acts of Virginia Assembly," 1875, ch. 48.

[96] "Acts of Virginia Assembly," 1882, ch. 6.

her ratifying act of 1882. In 1890, another effort was made to settle the dispute, and both States appointed commissioners for that purpose.[97]

Joint meetings were held by the commissioners at Point Comfort. The contention concerning "headlands" involved both jurisdiction and fishery privileges, and the determination of one meant a solution of the other. The land-mark to which the commissioners turned was the compact of 1785, but before they could reach an agreement, other complications arose between the States.

The oyster beds of the Chesapeake and its tributaries had increased rapidly in value, and Virginia protected her interests in this industry as she had never done before. Marylanders who ventured over the line of 1877 to take oysters ran the risk of being captured by the Virginia authorities.. In April of 1890, the Maryland General Assembly passed an act which authorized the Attorney-General of the State "to take such steps as may be necessary and proper to obtain as soon as possible a decision of the Supreme Court of the United States as to the scope and effect of the compact of 1785 . . . whether or not it applies to that body of water now called 'Pocomoke Sound,' through which the boundary line between Maryland and Virginia now passes, and whether or not the citizens of Maryland have a right to take oysters in said water jointly with the citizens of the State of Virginia, a right which the citizens of Maryland have enjoyed from the date of 'said compact' until about the year 1883, without molestation." [98]

The word "rivers" and not "bay" or "sound" was used in the compact of 1785. The first act by Virginia mentioning Pocomoke Sound was that of 1852, prohibiting non-residents from taking oysters in the waters of the State. In 1872, the commissioners for Maryland, in

[97] "Acts of Virginia Assembly, 1889–90, ch. 157. "Laws of Maryland," 1890, ch. 228.

[98] "Laws of Maryland," 1890, ch. 471.

their statements of the claims of their State, said to the commissioners of Virginia: "It is remarkable, too, that in the compact of 1785, while conceding that the rights of fishing in the Potomac River shall be common to and equally enjoyed by the citizens of both States, Maryland omitted to secure by express terms reciprocal rights in the Pocomoke River." [99] By the Virginia act of 1875, Marylanders were distinctly forbidden to take oysters in Pocomoke and Tangier Sounds. The position now taken by Maryland was to base her fishery privileges on the compact of 1785, and prove that Pocomoke River included the Bay and Sound. The question came to a definite issue in the trial of Marylanders for taking oysters in waters which Virginia had reserved to her own citizens.

In March, 1893, Robert L. Wharton and Severn Nelson were arrested by the Sheriff and indicted by the Grand Jury of Accomack County, being charged that they "did unlawfully take and catch oysters in the waters of Virginia and within the jurisdiction of said County on Ledge Rock in Pocomoke Sound."[100]

The case was taken from the County Court of Accomack on a question of jurisdiction. On a writ of *habeas corpus* it was transferred to the United States Circuit Court for the Eastern District of Virginia, and afterwards on appeal by the Maryland authorities, to the Supreme Court of the United States.

While this case was pending in court, serious conflicts took place on the waters in question, between the Virginia authorities and Maryland oystermen. Governor O'Ferrall, in the early part of 1894, sent a message to the Virginia Legislature calling attention to the great depredations in Tangier Sound, and making recommenda-

[99] "Report of Boundary Commission," 1874, p. 16.

[100] "Briefs of counsel in U. S. Supreme Court, Wharton v. Wise, 153 U. S. 155.

tions for a better oyster police force. It seems that a greater yield of the Virginia oyster grounds tempted the Maryland oystermen over the line. The Governor said: "at present our interests are actually at the mercy of these marauders, we are powerless to defend our rights, and daily and hourly these desperate men are found in our waters plying their vocation and carrying away the property of the state which she has declared shall be preserved for the use of her own citizens."[101]

On February 27, 1894, a fight was reported to have taken place in Tangier Sound. Eight or ten Maryland boats were found at work on the Virginia side of the dividing line and they were fired upon by the Virginia steamer Chesapeake of the oyster fleet. The Marylanders fled, returning fire, and were pursued into Maryland and arrested. Hardly had the news of this episode become generally known before Governor Brown, of Maryland, in response to a telegram, despatched the steamer Governor Thomas armed with a breech loading cannon and breech loading rifles to the Annamessex River. This time the trouble was with the Virginia dredgers, illegally taking oysters. The action of the Virginia steamer raised the question as to whether one State could lawfully seize the vessels of the other when once they had passed into their native waters. In the following March, Virginia passed "an act to provide for reciprocal rights and powers" between the two states. This act provided that "the offender can be pursued by the legally constituted authorities of said state whether the offense was committed up to and across the boundary line between said states, into the said waters of said state where the offender resides, to a distance not exceeding ten miles."[102] This was to be enforced on the passage of a similar act by Maryland.

[101] "Baltimore Sun," February 21, 1894.

[102] "Virginia Act of Assembly," 1894, ch. 828.

On April 23, 1894, the Supreme Court of the United States decided, in the case of Wharton and Nelson, that Pocomoke Sound was a distinct body of water and not a part of the Pocomoke River, and further, that "the compact of 1785 between Maryland and Virginia gives no right to citizens of Maryland to fish or take oysters in the waters of Pocomoke Sound." [103]

Maryland's contention was that the Sound was a part of the river, and that under the compact her citizens had a right to take oysters from it. In support of that view Maryland's counsel urged the agreement of 1785, but the adverse decision of the Court should set forever at rest the fishery and oyster troubles.[104]

The controversy between Maryland and Virginia began with the grant to Lord Baltimore in 1632. The whole of the grant to Baltimore was disputed at first, but soon the rival claims rested upon the interpretation of parts of the charter. Calvert and Scarburgh in 1668, ran a line across the Eastern Shore that has remained in part to the present time. The dispute over the head fountain of the Potomac was partly compromised, but the Civil War and the formation of West Virginia took the matter out of Virginia's hands and it still remains unsettled. In 1824 and 1872 noteworthy attempts were made to reach an adjustment but they practically failed. In 1877 the line dividing the two States was laid down by a board of arbitrators, but even this did not settle all contention between the states, though that line still remains as the boundary. The decision of the Supreme Court of the United States in 1894 defined the fishery rights of Maryland, and, it is hoped, concluded the long dispute.

[103] Wharton v. Wise, 153 U. S. 155.

[104] "The oyster beds of Maryland yield one-sixth of all the fisheries product of the United States and give employment to one-fifth of all the people in the United States engaged in fisheries. They are the greatest single source of wealth in the state. The output is double that of the coal mines and greater than the wheat crop. It is probable that the net yield of the Chesapeake oyster bottoms produces more net money than all the farms in the state." "Baltimore Sun," February 21, 1894.

LIFE

Louis N. Whealton was born on Chincoteague Island, Virginia, in 1872. He received his preliminary education in the public school of his birth place. He entered Western Maryland College, Westminster, Maryland, in 1888; and was graduated with the degree of A. B. in 1892. In that year he entered the Johns Hopkins University, and for more than three years pursued a course of graduate studies in the department of History and Politics. In 1896 he entered the University of Maryland, and completed the course leading to the degree of LL. B., which was awarded him in May, 1897. From the Johns Hopkins University he received the degree of Doctor of Philosophy in June, 1897.

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